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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. [redacted]98

EDWARD KOHN, DOING BUSINESS AS EDWARD KOHN COMPANY,

Petitioner,

vs.

JOSEPH H. FREEHILL, DIRECTOR OF PRICE STABILIZATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

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INDEX.

	PAGE
Opinion below	1
Jurisdiction	4
Questions presented	4
Statutes and regulations involved	5
Statement of Facts	6
Reasons for granting the writ	8
Argument	10
Conclusion	14
Appendix	15

CITATIONS.

Cases.

Henderson's Tobacco, 11 Wall. 652, 656, 657	13
Holden v. Hardy, 169 U. S. 366, 390, 391	12
International R. Company v. Davidson, 257 U. S. 506, 514	10
Lynch v. Tilden Produce Company, 265 U. S. 315, pp. 320-322	10
Manhattan General Equipment Company v. Commissioner of Internal Revenue, 297 U. S. 129, 133	10
Miller v. U. S., 294 U. S. 435, pp. 439-440	10
Morgan v. U. S., 304 U. S. 1, 14, 15	12
Pasadoes, Collector of Internal Revenue v. National City Bank, 296 U. S. 497, 503	13
Payne v. Central Pacific Railroad Co., 255 U. S. 228, 236	11
Powell v. Alabama, 287 U. S. 45, pp. 68-70	12
Re William Oliver, 333 U. S. 257, 273	12

Safeway Stores v. Arnall, 195 F. 2nd 319, 321 3
Safeway Stores v. Arnall, 196 F. 2nd 510, 513 4
Safeway Stores v. Freehill (1953), ... F. 2nd 3
St. Joseph Stock Yards v. United States, et al., 298 U. S. 38, 52 11
Snyder v. Massachusetts, 291 U. S. 97, 116 12
State of Kansas, ex rel. Beck v. Occidental Life Insurance Co., 95 F. 2nd 935, 937; Certiorari denied, 305 U. S. 63 12
United States v. Alpers, 338 U. S. 680, 681 14
United States v. Raynor, 302 U. S. 540, 552 14
United States v. State of California, 297 U. S. 175, 188. 13
United States v. Tynen, 11 Wall. 88, 92 13
Wetmore v. Marco, 196 U. S. 68, 77 14
Yakus v. U. S. and Rottenberg, et al. v. U. S., 321 U. S. 414 11
Yick Wo v. Hopkins, Sheriff, 118 U. S. 356, 369 11

Statutes and Regulations.

Ceiling Price Regulation 74 2
Defense Production Act of 1950, as amended (1951), section 402(k) 3, 5, 6, 7, 8, 12, 15
Defense Production Act of 1950, as amended in 1952, section 402(k) 2, 3, 5, 6, 7, 8, 12, 16
Defense Production Act of 1950, as amended, section 407(a) 2, 3, 4, 8, 12, 17
Defense Production Act of 1950, as amended, section 407(c) 4, 8, 10, 18
Defense Production Act of 1950, as amended, section 408(a) 8, 19
Defense Production Act of 1950, as amended, section 408(d) 4, 7, 9, 20

Defense Production Act of 1950, as amended, section 409(c) 6
Defense Production Act of 1950, as amended, section 706(b) 4
Emergency Price Control Act of 1942, section 204(d) .. 11
Fifth Amendment to the Constitution of the United States 5, 14
General Ceiling Price Regulation, sections 1, 2, 3(a) 1, 5, 6, 7, 21, 22
Section 1254 Title 28, U. S. C..... ... 4
Section 1345 Title 28, U. S. C..... 5

Miscellaneous.

"Legislative Regulation," Ernest Freund..... 13
Order Dismissing Protest .....23 et. seq.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Emergency Court of Appeals entered in this case on April 30, 1953.

OPINION BELOW.

By MARIS, *Chief Judge.*

The complainant in this case is engaged in the business of buying, selling and fabricating meat and meat products, including pork products, at the wholesale level of distribution. The General Ceiling Price Regulation[1] governed ceiling prices of pork cuts and pork products sold by the

1. Issued and effective January 26, 1951. 16 F. R. 308.

complainant until October 1, 1951 when it was superseded by Ceiling Price Regulation 74.[2] On June 10, 1952 a complaint for treble damages was filed in the United States District Court for the Northern District of Illinois charging the present complainant, defendant in that action, with having sold pork products and cuts between June 11, 1951 and September 30, 1951, inclusive, at prices in excess of its ceiling prices as established under the General Ceiling Price Regulation. An amended complaint was filed on December 5, 1952. The present complainant, on December 29, 1952, filed a protest with the respondent in which he objected to the institution of the enforcement proceeding and to the provisions of the General Ceiling Price Regulation insofar as they affected sales made by the complainant between June 11, 1951 and September 30, 1951, inclusive. The protest was dismissed by the respondent on February 2, 1953 as untimely. The objection against the bringing of the enforcement action was dismissed as not cognizable in a protest proceeding. The present complaint was filed on March 2, 1953 and the respondent has now moved to dismiss it.

The motion to dismiss the complaint must be granted. For it clearly appears that the respondent rightly dismissed the protest as not having been filed within the time prescribed by Section 407(a) of the Act. That Section requires a protest to be filed within six months after the effective date of the regulation unless new grounds of protest have arisen in which case it must be filed within six months after such new grounds arise. Here the complainant filed his protest more than 23 months after the effective date of the General Ceiling Price Regulation. He alleges, however, that the amendment of Section 402(k) of the Act, the so-called Herlong amendment, on June 30, 1952, by the Defense

2. Issued September 25, 1951, effective October 1, 1951. 16 F. R. 9759.

Production Act Amendments of 1952, constituted new grounds for protest of the General Ceiling Price Regulation. There is not merit in this contention. The Herlong amendment itself, as originally enacted July 31, 1951, applied only to regulations and orders issued after its enactment. *Safeway Stores* v. *Arnall,* Em. App. 1952, 196 F. 2d 510, 513; *Safeway Stores* v. *Freehill,* Em. App. 1953, ... F. 2d ..... It, therefore, did not apply to the General Ceiling Price Regulation which had been issued five months before. And as amended by the Defense Production Act Amendments of 1952, the Herlong amendment, by its express terms, applied only to regulations and orders which should be issued or which should remain in effect after June 30, 1952, the date of the amendment. But the General Ceiling Price Regulation had then been superseded for nine months by Ceiling Price Regulation 74 with respect to the complainant's sales and there is no contention by the complainant that Ceiling Price Regulation 74 violated the Herlong amendment.

Nor did the bringing of the enforcement suit against the complainant constitute new grounds for protesting the regulation alleged to have been violated by him. Aside from the fact that here the suit was brought more than six months before the filing of the protest, the respondent rightly ruled that the filing of the enforcement suit did not constitute grounds for protest of the regulation sought to be enforced. For the mere attempted enforcement of a valid regulation cannot alter its existing provisions or render it invalid. And if the regulation is invalid, the attempted enforcement of it can hardly render it any the more so. The bringing of an enforcement suit, therefore, cannot constitute new grounds under Section 407 (a) of the Act since the new grounds must themselves be grounds of objection sufficient to support the otherwise untimely protest and are, in fact, the only grounds which may be consid-

ered in support of it. *Safeway Stores* v. *Arnall,* Em. App. 1952, 195 F. 2d 319, 321.

We, of course do not pass upon the question whether, if judgment goes against the complainant in the enforcement action, he may be able to obtain leave from the District Court to file a complaint in this court under Section 408 (d) of the Act, as amended, by making the showing required by that section that his objections to the regulation are made in good faith and that there is reasonable and substantial excuse for his failure to present them in a protest in accordance with Section 407 of the Act. It would seem, however, that in such a complaint, if leave should be given to file it, the complainant would be entitled to assert any objections to the General Ceiling Price Regulation which the District Court granted him leave to include, without regard to the time limitations of Section 407 (a) of the Act.

A judgment will be entered dismissing the complaint.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 408 (d) of the Defense Production Act of 1950, as amended, 50 App. U. S. C., Section 2108 (d) and Section 1254 of Title 28, U. S. C.

QUESTIONS PRESENTED.

The following questions are presented:

1. Whether or not Section 407 (a), Section 407 (c), and Section 408 (d) of the Defense Production Act of 1950, as amended, may be so construed as to take from a defendant his right to defend a plenary civil action brought against him in the United States District Court under Section 706

(b) of the Defense Production Act of 1950, as amended, and Section 1345, Title 28, U. S. C.

2. Whether or not the Fifth Amendment to the Constitution of the United States is violated by denying to a defendant the right to defend himself in a plenary civil action either in the court in which the action is brought or in any other court.

3. Whether or not the refusal of the Emergency Court of Appeals to consider a defense to a plenary civil action until after judgment against the defendant is entered in the trial court takes from said defendant the rights guaranteed him by the Fifth Amendment to the Constitution of the United States.

4. Whether or not the Director of Price Stabilization, an administrative officer, has the right to construe the legal meaning and purpose of an act of the Congress.

5. Whether or not the Emergency Court of Appeals violated established law by its ruling that the Herlong amendment of July 31, 1951 and the amendment of June 30, 1952 to the Defense Production Act of 1950, as amended, did not supersede the Regulation issued by the Director of Price Stabilization on January 26, 1951, although the acts of the Congress are repugnant to said regulation.

STATUTES AND REGULATIONS INVOLVED.

The statutes involved in this proceeding are as follows (See Appendix):

1. Section 402 (k) of the Defense Production Act of 1950, as amended, act of July 31, 1951, 82nd Congress, 1st Session, Sec. 104 (h).
2. Section 402 (k) of the Defense Production Act of 1950, as amended in 1952. 50 App. U. S. C. 2102 (k).
3. Section 407 (a) of the Defense Production Act of 1950, as amended, 50 App. U. S. C., Section 2107 (a).

4. Section 407 (c) of the Defense Production Act of 1950, as amended, 50 App. U. S. C., Section 2107 (c).
5. Section 408 (a) of the Defense Production Act of 1950, as amended, 50 App. U. S. C. 2108 (a).
6. Sections 1, 2, 3 (a) of General Ceiling Price Regulation issued by the Director of Price Stabilization, effective January 26, 1951 (16 F. R. 808).

STATEMENT OF FACTS.

On June 10, 1952, the United States of America brought an action in the United States District Court, Northern District of Illinois, asking for a judgment against petitioner under Section 409 (c) of the Defense Production Act of 1950, as amended, by reason of alleged violations by him of the General Ceiling Price Regulation issued by the Director of Price Stabilization on January 26, 1951,[1] arising out of the sale of pork cuts and pork products by him from June 11, 1951, to September 30, 1951, both dates inclusive. This complaint was later amended on December 5, 1952, by which amendment the United States of America requested a judgment in treble the amount of the alleged overcharges or in the total amount of $45,017.46.

Petitioner filed an answer in the United States District Court, Northern District of Illinois, in which his defense is that the prices which he is alleged to have charged for his products were legal charges by reason of the Herlong amendment to the Defense Production Act of 1950, as amended (Section 402 k)[2] enacted by the Congress on July 31, 1951 and amended by the Congress on June 30, 1952.[3]

The Herlong amendment of the Defense Production Act

1. Appendix, page 21.
2. Appendix, page 15.
3. Appendix, page 16.

of 1950 enacted on July 31, 1951, authorizes the sellers of materials at retail or wholesale to charge their customary percentage margin over costs of materials during the period from May 24, 1950 to June 24, 1950 which customary percentage margin over costs was not allowed by the General Ceiling Price Regulation issued on January 26, 1951.

The Congress on June 30, 1952 clarified the meaning and purpose of the Herlong amendment by eliminating the word, *hereafter,* contained in said act and replacing the same by the words, *shall be issued or remain in effect.* (Italics ours.)

The Director of Price Stabilization through his attorneys insisted that the United States District Court did not have jurisdiction to consider the defense pleaded by the petitioner, and that the only manner in which such a defense could be heard was by a Letter of Protest directed to the Director of Price Stabilization, and the Trial Court, after reading Section 408 (d) of the Defense Production Act of 1950,[4] as amended, recommended that the proper manner to present petitioner's defense was by a Letter of Protest.

The petitioner in compliance with the demand of the Director of Price Stabilization and the suggestion of the Trial Court filed a Protest with the Director of Price Stabilization on December 29, 1952. This Protest was dismissed by the Director of Price Stabilization on February 2, 1953 on the grounds that the Protest was not filed within six months after the effective date of General Ceiling Price Regulation issued by him on January 26, 1951, and on the further ground that the acts of the Congress passed on July 31, 1951 and amended on June 30, 1952, as he construed them, had no legal effect upon his regulations,[5] and were not new grounds of which he was required to take

4. Appendix, page 20.

5. Appendix, page 23. See pages 24, 25, 26.

notice as set forth in Section 407 (a) of the Defense Production Act of 1950,[6] as amended.

The petitioner had requested the right to present oral arguments to the Board of Review as is provided in Section 407 (c) of the Defense Production Act of 1950, as amended.[7] The petitioner was denied the opportunity to present any oral argument as is provided by this act of Congress, and as he requested in his Letter of Protest.

The petitioner filed an appeal under Section 408 (a)[8] of the Defense Production Act of 1950, as amended, with the Emergency Court of Appeals in which appeal petitioner requested the court to determine whether or not the act of the Congress passed on July 31, 1951 and amended on June 30, 1952 (Section 402 (k) of the Defense Production Act) was a sufficient defense to the plenary civil action based upon the alleged violation of the General Ceiling Price Regulation issued on January 26, 1951 by reason of the fact that it set forth a new and different method of determining price ceilings.

The Emergency Court of Appeals without giving the defendant any opportunity to present orally his argument before said court, or granting him the right to file a written brief, did, on April 30, 1953, upon motion of the respondent herein, enter a judgment dismissing the petitioner's appeal.

REASONS FOR GRANTING THE WRIT.

The Emergency Court of Appeals by its judgment upholding the decision of the Director of Price Stabilization dismissing the Protest filed by the petitioner and ruling that petitioner must obtain leave from the District Court

6. Appendix, page 17.
7. Appendix, page 18.
8. Appendix, page 19.

to file a complaint with the Emergency Court of Appeals does, in effect, state that only after a judgment for plenary damages has been entered in the District Court can the defendant present to the court his defense to such plenary action.

There are pending in the District Courts of the United States some one thousand cases brought by the Director of Price Stabilization.[9]

It is not the purpose of this petitioner to question the validity of Section 408 (d) of the Defense Production Act of 1950, as amended. It is his purpose to question the right of an administrative officer to interpret an act of the Congress so as to make his regulations of greater importance than Acts of the Congress, and it is the further purpose of the petitioner to question the interpretation of Section 408 (d) of the Defense Production Act of 1950, as amended, by the Emergency Court of Appeals in a manner which takes from a defendant his right to defend himself in a civil plenary action brought by the United States until after judgment against the defendant is entered in the trial court.

This attempt by an administrative officer to act as a court, and the interpretation of the law as made by the Emergency Court of Appeals is contrary to our law and attempts to set forth a novel procedure for taking from a defendant his constitutional right to defend himself.

9. Article in "The Journal of Commerce," page 1, issue May 12, 1953.

ARGUMENT.

In the case of *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue*, 297 U. S. 129, the court on page 133, says:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by the courts —but the power to adopt regulations to carry into effect the will of Congress as expressed by statute, and a regulation which does not do this but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch* v. *Tilden Produce Company*, 265 U. S. 315, pp. 320-322; *Miller* v. *U. S.*, 294 U. S. 435, pp. 439-440, and cases cited. And not only must the regulation in order to be valid be consistent with the statute but it must be reasonable. *International R. Company* v. *Davidson*, 257 U. S. 506, 514."

The Director of Price Stabilization in his attempt to uphold his own regulation issued by him on January 26, 1951 assumes the power to rule that the acts of the Congress thereafter enacted and which have a direct bearing upon his regulation have no legal effect insofar as his regulation is concerned.

This administrator in construing the meaning and purport of Acts of the Congress and the construction of the power granted to him by the Congress finds sufficient authority to deny to the defendant his right to be heard as set forth in Section 407 (c) of the Defense Production Act of 1950, as amended, by merely dismissing the defendant's Protest and saying that the same has not been filed within the statutory time.

The language of Chief Justice Hughes in the case of *St. Joseph Stock Yards* v. *United States, et al.,* 298 U. S. 38, is pertinent to the attempt by the administrative officer to take from the defendant his constitutional rights through his interpretation of the law.[10]

The Congress did establish an administrative agency for the purpose of hearing protests involving the validity of a regulation, and it prescribed an orderly manner in which the Director of Price Stabilization's ruling should be reviewed by a Board of Review wherein a defendant is given the legal right to present himself and present an oral argument. This administrative agency is not intended as a substitute for a trial court to determine the sufficiency or insufficiency of a defense to a regulation which is sought to be enforced by the administrator. Nor is it intended that this administrator may take from a defendant his constitutional right to defend himself.

The defendant is aware of the ruling of this Court in the case of *Yakus* v. *U. S.* and *Rottenberg, et al.* v. *U. S.,* 321 U. S. 414, where the validity of Section 204 (d) of the Emergency Price Control Act of 1942, which is similar to Section 408 (d) of Defense Production Act of 1950, as amended, was held to be valid. However, the construction by this Court of that act does not in any manner support an attempt by an administrative officer to construe the meaning and purpose of Acts of the Congress, and it does not authorize the Emergency Court of Appeals to take from a defendant his right to defend himself until after a judgment is entered against him in the trial court.

10. *St. Joseph Stock Yards* v. *U. S., et al.,* 298 U. S. 38, p. 52. "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." See also *Yick Wo* v. *Hopkins, Sheriff,* 118 U. S. 356, 369; *Payne* v. *Central Pacific Railroad Company,* 255 U. S. 228, p. 236.

The right of a defendant to have his day in court and an opportunity to be heard in his defense is a basic right which this Court has always protected. *Re William Oliver*, 333 U. S. 257, page 273; *Snyder* v. *Massachusetts*, 291 U. S. 97, 116; *Holden* v. *Hardy*, 169 U. S. 366, 390, 391; *Powell* v. *Alabama*, 287 U. S. 45, pp. 68-70; *Morgan* v. *U. S.*, 304 U. S. 1, 14, 15; *State of Kansas, ex rel. Beck* v. *Occidental Life Insurance Co.*, 95 F. 2d 935, page 937, certiorari denied 305 U. S. 63.

The Emergency Court of Appeals by its action in sustaining the motion of the United States of America to dismiss defendant's appeal to that court from the ruling made by the Director of Price Stabilization without giving to the defendant an opportunity to be heard or an opportunity to present a legal brief supporting his defenses violated the Fifth Amendment to the Constitution of the United States.

The Emergency Court of Appeals attempts to construe the meaning and effect of the Act of the Congress enacted on July 31, 1951 and amended on June 30, 1952 (Section 402 (k) of the Defense Production Act of 1950, as amended) only after ruling that the motion by the administrator to dismiss the appeal because the protest was not filed within the time prescribed by Section 407 (a) of the Defense Production Act of 1950, as amended, must be allowed. Its construction of the word "hereafter," contained in the Act of the Congress of July 31, 1951, so as to make that Act ineffective until the Director of Price Stabilization deemed it advisable to issue new rules and regulations is contrary to our law.

The Act of the Congress deals with the same subject matter as does the regulation issued by the Director of Price Stabilization and sets forth a method for determining ceiling prices which is different than the method prescribed by the regulation theretofore issued. An Act of the

Congress which is repugnant to a regulation supersedes the same and said regulation becomes ineffective as of the day that the Act of the Congress becomes law. *U. S.* v. *Tynen,* 11 Wall. 88, 92; *Henderson's Tobacco,* 11 Wall. 652, 656, 657; *U. S.* v. *State of California,* 297 U. S. 175, 188; *Pasadoes, Collector of Internal Revenue* v. *National City Bank,* 296 U. S. 497, 503.

The Emergency Court of Appeals finds it necessary in order to dismiss the defendant's appeal without giving him an opportunity to be heard in that court to rule that an amendment to the Herlong amendment enacted by the Congress on June 30, 1952 which clarified the intent of the law was of no value to the defendant in his attempt to present a legal defense because such amendment did not afford new grounds for challenging the right of the Government to enforce the administrator's regulation in the District Court. This strained interpretation of the amendment to the Defense Production Act as enacted by the Congress on June 30, 1952 is contrary to the principles of legislative construction.

Ernest Freund in his book, "Legislative Regulation," on page 421 says:

> "It is generally quite a simple matter to indicate by a very few words a legislative intent to give a provision purely prospective operation; and while their omission should not be given undue weight, the court may well be justified in applying a beneficial statute broadly, if a non-application to existing conditions is not supported by strong equities."

The Emergency Court of Appeals has failed to take consideration of any equities or rights in its ruling that the amendment to the Herlong amendment of June 30, 1952 was not for the benefit of the defendant and that his right to invoke said amendment could not be asserted by him

Section 402 (k) of the Defense Production Act of 1950 as amended in 1952, 50 App. U. S. C. Section 2102 (k):

"(k) No rule, regulation, order, or amendment thereto shall be issued or remain in effect under this title, which shall deny sellers of material at retail or wholesale their customary percentage margins over costs of the materials or their customary charges during the period May 24, 1950, to June 24, 1950, or on such other nearest representative date, determined under section 402 (c), as shown by their records during such period, except as to any one specific item of a line of material sold by such sellers which is in short supply as evidence by specific government action to encourage production of the item in question: *Provided, however,* That if the antitrust laws of any State have been construed to prohibit adherence by sellers of materials at wholesale or retail to uniform suggested retail resale prices, the President shall issue regulations giving full consideration to the customary percentage margins of such sellers during the period hereinbefore set forth. No such exception shall reduce such customary margins of sellers at retail or wholesale beyond the amount found by the President, in writing, to be generally equitable and proportionate in relation to the general reductions in the customary margins of all other classes of persons concerned in the production and distribution of the excepted item of material.

Prior to making any finding that a specific item of material shall be so excepted, or as to the amount of the reductions in customary margins to be imposed upon retail and wholesale sellers of such item, the President shall consult with representatives of the affected retail and wholesale sellers concerning the basis for and the amount of the exception which is proposed with respect to any such item.

For purposes of this section a person is a 'seller of a material at retail or wholesale' to the extent that such person purchases and resells an item of material without substantially altering its form; or to the extent that such person sells to ultimate consumers except (1) to government and institutional consumers and (2) to consumers who purchase for consumption in the course of trade or business."

Section 407 (a) of the Defense Production Act of 1950, as amended, 50 App. U. S. C., section 2107 (a):

"SEC. 407. (a) At any time within six months after the effective date of any regulation or order relating to price controls under this title or rent controls under the Housing and Rent Act of 1947, as amended, or, in the case of new grounds arising after the effective date of any such regulation or order, within six months after such new grounds arise, any person subject to any provision of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation or order may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the President. Within a reasonable time after the filing of any protest under this section, but in no event more than thirty days after such filing, the President shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the President denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the President has taken official notice.

Section 407 (c) of the Defense Production Act of 1950, as amended, 50 App. U. S. C., section 2107 (c):

"(c) Any proceedings under this section may be limited by the President to the filing of affidavits, or other written evidence, and the filing of briefs: Provided, however, That upon the request of the protestant, any process filed in accordance with subsection (a) of this section shall, before denial in whole or in part, be considered by a board of review consisting of one or more officers or employees of the United States designated by the President in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpoenas shall issue to procure the evidence of persons, or the production of documents, or both. The President shall cause to be presented to the board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the President. The protestant shall be informed of the recommendations of the board and, in the event that the President rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection."

Section 408 (a) of the Defense Production Act of 1950, as amended, 50 App. U. S. C., section 2108 (a).

"SEC. 408. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within 30 days after such denial, file a complaint with the Emergency Court of Appeals specifying his objections and praying that the regulation or order protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the President, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the President has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation or order, in whole or in part, to dismiss the complaint, or to remand the proceeding: Provided, That the regulation or order may be modified or rescinded by the President at any time notwithstanding the pendency of such complaint. No objection to such regulation or order, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the President and not admitted, or which could not reasonably have been offered to the President or included by the President in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the President. The President shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation or order as a result thereof; except that on request by the President, any such evidence shall be presented directly to the court."

Section 408 (d) of the Defense Production Act of 1950, as amended, 50 App. U. S. C., section 2108 (d).

"(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under this title, and of any provision of any such regulation or order. Except as provided in this section, no court, federal, state, or territorial, shall have jurisdiction or power to consider the validity of any such regulation or order relating to price controls, or to stay, restrain, enjoin, or set aside in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision."

Sections 1, 2, 3 (a) of General Ceiling Price Regulations, originally issued by the Director of Price Stabilization on January 26, 1951, 32A CFR, chapter III, 16 F. R. 808.

"SECTION 1. *What this regulation does.* The purpose of this regulation is to establish ceiling prices for all commodities and services (except those specifically exempt) upon the basis of prices in effect during the period from December 19, 1950 to January 25, 1951, inclusive. This period is referred to as the 'base period.' With respect to those food, agricultural and related commodities exempt under the provisions of section 14 (s), however, the applicable 'base period' used after removal of the exemption to establish the ceiling price under section 3 of this regulation shall be the most recent five-week period preceding the date the Director of Price Stabilization deletes the commodity from the list of agricultural commodities in section 11 (a).

[Sec. 1 as amended by Amendment No. 7, effective 3/20/51, 16 F. R. 2546; No. 13, effective 5/28/51, 16 F. R. 5051.]

SEC. 2. *Applicability, effective date, and prohibitions.* (a) *Applicability.* The provisions of this regulation are applicable to the United States, its Territories and Possessions and the District of Columbia.

(b) *Effective date.* This regulation is effective immediately.

(c) *Prohibitions.* After the date of this order, regardless of any contract or other obligation, you shall not sell, and you shall not buy in the regular course of business or trade, any commodity or service at a price exceeding the ceiling price established by this regulation.

SEC. 3. *General ceiling prices.*

(a) *Ceiling prices for all sellers for commodities or services sold in base period.* Your ceiling price for sale of a commodity or service is the highest price at which you delivered it during the base period to a

purchaser of the same class. If you did not deliver the commodity or service during the base period, your ceiling price is the highest price at which you offered it for base period delivery to a purchaser of the same class. The offer must have been made in writing and communicated to a substantial number of customers, but in the case of a retailer may have been made by display. If you are a manufacturer or a wholesaler, you cannot, unless permitted by paragraph (b) (i) of this section use a price as your ceiling price to a class of purchaser unless you made at least 10 percent by dollar volume of your total deliveries of the commodity during the base period to that class of purchasers at that price or at a higher price."

Order dismissing Protest:

On December 29, 1952, Edward Kohn, d/b/a Edward Kohn Company, 3843 South Emerald Ave., Chicago 9, Illinois, filed a protest under Section 407(a) of the Defense Production Act of 1950, as amended, with the Director of Price Stabilization attacking the validity of Sections 1, 2(c) and 3 of the General Ceiling Price Regulation (GCPR) insofar as they related to the sale of pork cuts and pork products at wholesale. Protestant further objects to enforcement action instituted against him in the United States District Court for the Northern District of Illinois because of violations of the aforesaid provisions of GCPR.

Protestant states that he is engaged in the buying, selling, and fabri ating of meat and meat products, including pork products, at the wholesale level of distribution. The GCPR was issued and became effective on January 26, 1951. On September 25, 1951, CPR 74 (Ceiling Prices of Pork Sold at Wholesale) was issued and became effective on October 1, 1951. CPR 74 suspended the provisions of the GCPR insofar as they related to pork sold at wholesale. It appears that Protestant is charged with having sold pork products and pork cuts between June 11, 1951 and September 30, 1951, inclusive, at prices in excess of its ceiling prices as established under the GCPR. As a result of these alleged overcharges, a complaint for treble damages was filed on June 1, 1952 in the United States District Court for the Northern District of Illinois and an amended complaint on December 5, 1952. Protestant then filed this protest objecting to the provisions of the GCPR and to the enforcement proceedings as being in violation of Section 402(k) of the Defense Production Act, as amended June 30, 1952.

While objections to the validity of a regulation such as those presented here are properly the subject of a protest within the purview of Section 407(a) of the Defense Production Act and while the GCPR is a protestable regulation under that section, the protest is defective in that it has not been filed within the time prescribed by statute and must, therefore, be dismissed. Section 407(a) requires that a protest must be filed:

> at any time within six (6) months after the effective date of any regulation or order relating to price controls or, in the case of new grounds arising after *the effective date of any such regulation or order, within six months after such new grounds arise.*

The sections of the GCPR to which Protestant objects became effective January 26, 1951. The protest was filed December 29, 1952, twenty-three months later. The protest is thus an untimely one unless there exist new grounds arising after the effective date of the regulation. *No new grounds, however, are shown by Protestant.* He claims that Sec. 402(k), as amended June 30, 1952, operates retroactively thereby applying to the GCPR as it existed between June 11, 1951 and September 30, 1951.

The language to which Protestant alludes reads as follows:

> No rule, regulation, order or amendment thereto shall be issued or *remain in effect* under this title, which shall deny sellers of materials at retail or wholesale their customary percentage margins over costs or their customary charges during the period May 24, 1950 to June 24, 1950, or on such other nearest representative date, determined under section 402(c) • • •. (Emphasis supplied.)

However, the emphasized words, which were added June 30, 1952, are clearly prospective in nature and provide only that no regulations shall remain in effect after the passage of the amendment which shall deny to sellers at retail or wholesale their customary margins or charges. There is no merit in Protestant's contentions that the amendment relates back to regulations as they existed prior to the adoption of the amendment. Section 402(k) as originally enacted on July 31, 1951 provided:

> no rule, regulation, order or amendment thereto shall *hereafter* be issued under this title.

By its express terms, it did not apply to regulations, such as the GCPR, which were already in existence at the time Section 402(k) was enacted. The sole purpose of the 1952 amendments was to strike out the word "hereafter" and make the amendment applicable to all regulations in force at the time it was enacted, whether or not they were enacted prior to its issuance date.

The legislative history confirms this conclusion. In the conference report it was stated:

> The House amendment contained provisions *which would* * * * *forbid the maintenance in effect* of rules, regulations, orders or amendments thereto, whether issued before or after the enactment of the amendment, unless they meet the requirements of the subsection. The conference substitute retains the provisions of the House amendment * * * p. 19. Conference Report: House Report 2352 on S. 2594, 82nd Congress, 2d Session.

The italicized language again emphasizes the prospective nature of this amendment. Similarly in the House Report, the following appears with reference to the proposed amendment of Section 402(k):

> Under the new provisions, distributors who can show that under the existing regulations they are not receiving the prescribed margins will be entitled to margins conforming to the requirements of this section. p. 25, House Report 2177 on H. R. 8210, 82nd Congress, 2d session.

On the floor of the House, Representative Paul Brown, one of the managers for the committee, stated in the same vein:

> Those [regulations] that were issued before the adoption of the amendment cannot remain in effect if they deny distributors their customary margins over costs in the base period * * * p. 7680, June 18, 1952, 98 Congressional Record, daily unbound edition.

Thus, the legislative history makes it clear that the 1952 amendments to Section 402(k) were intended to apply prospectively to new regulations as well as to those predating adoption of the amendment. A thorough study of the Congressional history shows no intention, either on the part of Congress or on the part of any individual testifying before its committees, to make the amendment to Section 402(k) operate retroactively to a regulation in order to condone or forgive violations occurring prior to its enactment.

The objection which Protestant makes to the enforcement action instituted in the United States District Court is defective for an additional reason. The jurisdiction of the Director in protest proceedings is defined in Section 407(a) of the Defense Production Act, as follows:

> * * * any person subject to any provisions of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision.

Similar language is contained in Section 51 of Price Procedural Regulation 1, Revision 2 (PPR1, Rev. 2). Thus a protest proceeding is limited by statute to objections to regulations or orders and does not extend to the enforcement action against which this protest is filed. Since the protest is being dismissed on procedural and jurisdictional grounds, it is not being referred to a Board of Review for consideration of the question whether ceiling prices established by the GCPR for sellers of pork products at wholesale (to which class of sellers Protestant belongs) violate Section 402(k) of the Defense Production Act, as amended.

Accordingly, upon consideration of all the matters herein and pursuant to authority granted to the Director of Price Stabilization by Executive Orders Nos. 10161 and 10281 and Economic Stabilization Agency General Order No. 2, as amended, and in accordance with Section 407 of the Defense Production Act of

1950, as amended, and Price Procedural Regulation 1, Revision 2, it is

ORDERED, that

The protest be and hereby is, dismissed.

Issued and effective this 2nd day of February, 1953.

(Signed) JOSEPH H. FREEHILL,
Director of Price Stabilization.

Certified to be a true copy of the original:

J. L. DWYER,
Certifying Officer.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	11
Appendix	12

Cases:

Lockerty v. *Phillips*, 319 U.S. 182	10
Safeway Stores v. *Arnall*, 195 F. 2d 319, certiorari denied, 343 U.S. 965	10
Safeway Stores v. *Freehill*, 202 F. 2d 753	8, 10
Yakus v. *United States*, 321 U.S. 414	10

Statutes:

Defense Production Act of 1950, c. 932, 64 Stat. 798, as amended by § 104(h) of the Act of July 31, 1951, c. 275, Title I, 65 Stat. 131, 136, and as amended by §§ 110, 113(b) and 121(b) of the Act of June 30, 1952, c. 530, Title I, 66 Stat. 296 *et seq.*:	
Section 402(k) (50 U.S.C.A. App. 2102(k))	3, 6, 7, 9, 12
Section 407(a) (50 U.S.C. App. Supp. V, 2107(a))	3, 5, 10, 12
Section 717(a) (50 U.S.C.A. App. 2166(a))	4, 5
Section 717 (b)(3) (50 U.S.C. App., Supp. V, 2166(b) (3))	5

Miscellaneous:

Ceiling Price Regulation 74 (16 F.R. 9759)	2, 7, 9
Conference Report, H. No. 770, 82d Cong., 1st Sess. p. 25	8
Conference Report, H. No. 2352, 82d Cong., 2d Sess. p. 19	9
General Ceiling Price Regulation of 1951 (16 F.R. 808)	2, 5
H. R. 8210, 82d Cong.	9
S. 1717, 82d Cong.	8
S. 2594, 82d Cong.	8

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 98

EDWARD KOHN, DOING BUSINESS AS EDWARD KOHN COMPANY, PETITIONER

v.

JOSEPH H. FREEHILL, DIRECTOR OF PRICE STABILIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 29-32) is reported at 203 F. 2d 958.

JURISDICTION

The judgment of the Emergency Court of Appeals (R. 33) was entered on April 30, 1953. The petition for a writ of certiorari was filed on May 29, 1953. The jurisdiction of this Court is invoked

under Section 408(c) of the Defense Production Act of 1950, c. 932, 64 Stat. 798, 809, as amended by the Act of June 30, 1952, c. 530, Title I, § 113(b), 66 Stat. 296, 302, 303, 50 U. S. C. A. App. 2108(c).

QUESTION PRESENTED

Whether petitioner's protest of the General Ceiling Price Regulation of 1951 was filed within the time limitations of Section 407(a) of the Defense Production Act of 1950.

STATUTE INVOLVED

The pertinent sections of the Defense Production Act are set forth in material part in the Appendix, *infra,* pp. 12-13.

STATEMENT

By a complaint filed on June 10, 1952, amended on December 5, 1952, the Director of Price Stabilization brought an action against Edward Kohn, doing business as Edward Kohn Company, in the United States District Court for the Northern District of Illinois, to recover treble damages for alleged overcharges by Kohn on the sale of pork products between June 11, 1951, and September 30, 1951, in violation of the General Ceiling Price Regulation (G. C. P. R.) (R. 5).[1] On December

[1] On January 26, 1951, the Director of Price Stabilization issued the General Ceiling Price Regulation (16 F.R. 808; 811-17). The regulation became effective immediately and its general effect and purpose was to hold prices on a broad front by employing the "freeze" technique. Under the regulation, the highest price charged by a particular seller for each commodity during the period from December 19, 1950, to January 25, 1951, became his ceiling price for all subsequent sales of the commodity. The original applicability of the General Ceiling Price Regulation to petitioner's sales is unquestioned. As of October 1, 1951, petitioner's sales became subject to Ceiling Price Regulation 74 (16 F.R. 9759).

29, 1952, Kohn filed a protest with the respondent, pursuant to the provisions of § 407(a) of the Defense Production Act of 1950, (50 U. S. C. App., Supp. V, 2107(a), App. *infra* p. 12), in which he attacked the validity of the G. C. P. R. insofar as it related to the sale of pork cuts and pork products at wholesale. He further objected to the treble damage proceeding instituted and pending against him in the district court. (Pet. App. 23.)

The protest was dismissed as untimely, not having been filed within six months of the effective date of the G. C. P. R. and because no new grounds arose or were shown to have arisen subsequent to the effective date of the regulation within the meaning of § 407(a) of the Act. Insofar as the protest related to the enforcement proceeding pending in the district court, it was dismissed as being beyond the jurisdiction of the Director of Price Stabilization, as defined in § 407(a). (Pet. App. 25-26.)

On March 2, 1953, petitioner filed his complaint with the Emergency Court of Appeals (R. 1-7) in which he alleged that his protest had been filed within the time limits of § 407(a), by reason of certain 1951 and 1952 amendments to the Defense Production Act (§ 402(k) as amended, 50 U.S.C.A. App. 2102(k), App. *infra* pp. 12-13) which assertedly constituted "new grounds" for protest "arising after the effective date" of the G. C. P. R., and thus permitted a protest after six months. Petitioner further alleged that the commencement of the enforcement proceedings in the district court also constituted "new ground" for protest within

the meaning of § 407(a). He prayed that the Emergency Court of Appeals enter an order to the effect that the G. C. P. R. was nullified by reason of the July 31, 1951, amendment to the Defense Production Act, as amended, 50 U. S. C. App., Supp. V, 2102(k).

Respondent moved to dismiss the complaint. Upon consideration of the motion and with the benefit of written arguments submitted by both petitioner and respondent (R. 10-17; 20-27), the court below entered its judgment dismissing the complaint for the reason that the protest had not been filed within six months of the effective date of the G. C. P. R. It held that because the 1951 amendment had no application to regulations in effect at the time of its enactment and because the G. C. P. R. no longer controlled petitioner s prices at the time of the 1952 amendment, no new grounds existed upon which to base a protest. Neither, the court held, did the bringing of the enforcement suit against the petitioner constitute new grounds for protesting the regulation allegedly violated. (R. 31.)

ARGUMENT

The petition seeks review of a judgment of the Emergency Court of Appeals which dismissed as untimely a belated attack upon the 1951 General Ceiling Price Regulation issued under the Defense Production Act of 1950, c. 932, 64 Stat. 798, as amended, 50 U. S. C. App., Supp. V, 2061 *et seq.*[2]

[2] Title IV of the Defense Production Act and the authority conferred thereunder terminated as of April 30, 1953. § 121(b)

The decision below is clearly correct and no question of general or continuing importance is presented meriting further review by this Court.

1. In essence, the complaint filed in the court below (R. 1-7) and the present petition constitute an attack upon the validity of the G. C. P. R., which was issued and which became effective January 26, 1951 (16 F. R. 808, 811-812). The sole question decided by the court below and the only material question presented by the petition is whether the protest filed by petitioner with the respondent on December 29, 1952, was within the time limitations for filing the protest as prescribed by § 407(a) of the Act.

In material part, § 407(a) provides that "within six months after the effective date of any regulation * * * relating to price controls * * * or, in the case of new grounds arising after the effective date of any such regulation * * *, within six months after such new grounds arise, any person subject to any provision of such regulation * * * may * * * file a protest * * *." Petitioner does not suggest that his protest filed on December 29, 1952, was filed within six months of the effective date of the G. C. P. R. but instead alleges that the protest was timely by reason of "new grounds" which arose after the effective date of the regulation. In support of this contention he relies upon the amendment of July 31, 1951, to the Defense

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of the Act of June 30, 1952, c. 530, Title I, 66 Stat. 306, 50 U.S.C.A. App. 2166(a). For purposes of liquidation, agencies created under the Act may be continued for six months from the date of termination. 50 U.S.C. App., Supp. V, 2166(b)(3).

Production Act (the Herlong Amendment)[3] which added a new subsection (§ 402(k)) to the Act and which, petitioner urges, when considered with the 1952 Amendment of § 402(k), nullified the G. C. P. R. of January 26, 1951, and thus constituted a "new ground" upon which to base a protest.

The 1951 amendment provided in pertinent part:

> No rule, regulation, order or amendment thereto *shall hereafter be issued* under this title, which shall deny to sellers of materials at retail or wholesale their customary percentage margins over costs of the materials during the period May 24, 1950, to June 24, 1950 * * *" [emphasis supplied].

Clearly, the contention that this amendment had the effect of nullifying the G. C. P. R. is without merit. The argument flies in the face of the prospective language of the amendment which plainly applied only to such rules, regulations and orders as *"shall hereafter be issued"* and thus obviously did not affect those regulations, including the G. C. P. R., which were extant at the time of the amendment. But even if it be assumed that the amendment was a "new ground" upon which to base a protest, petitioner's protest was not filed until December 29, 1952, almost 17 months after the so-called "new ground" arose, and therefore was not within the extended time limitation prescribed by § 407(a).

Petitioner obviously recognizes the manifest in-

[3] Act of July 31, 1951, c. 275, Title I, § 104(h), 65 Stat. 131, 136.

firmity of his position and hence strained reliance is placed upon the amendment to § 402(k) which was enacted on June 30, 1952.[4] By the 1952 amendment, the percentage margin requirement of § 402(k) became applicable to *existing* rules, regulations or orders as well as to those thereafter to be issued. The net effect of this 1952 modification of § 402(k) was to vitiate any *existing* rule, regulation or order which, on the date of enactment, denied the 1950 percentage margin to wholesalers and retailers. This change, petitioner asserts, was a "new ground" upon which to found a protest. But the fallacy of this contention is apparent, for at the time of the 1952 amendment petitioner's sale prices were controlled not by the G. C. P. R. to which his protest was directed, but by Ceiling Price Regulation 74, issued on September 25, 1951, effective October 1, 1951 (16 F. R. 9759), which already conformed to the percentage margin requirement of § 402(k). Thus, there was no existing regulation applicable to petitioner at the time of the 1952 amendment and, in the light of the plain language employed by Congress, it is clear that the 1952 amendment to § 402(k) was not intended as a sanctuary for previous violators of the G. C. P. R., or that it was intended to condone past violations of a regulation which, during the time it was in effect, was in all respects valid though perhaps reflecting a narrower pricing base than that which was ultimately to prevail.

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[4] § 110 of the Act of June 30, 1952, c. 530, Title I, 66 Stat. 296, 299-300, as amended, 50 U.S.C.A. App. 2102(k).

Were there room for doubt as to the purpose and intended effect of both the 1951 and 1952 amendments, it would be effectively resolved by the legislative history.

Section 402(k) had its inception in a House amendment to the Senate Bill (S. 1717) to amend the Defense Production Act. The bill, as originally introduced and passed in the Senate, contained no provision with respect to percentage margins. The House amendment provided, subject to exceptions not here material, that no action should be taken under the Act which deprived a seller at retail or wholesale of his customary percentage margin over his cost of material during the 1950 base period. The bill was referred to a conference committee which modified the House amendment so as to make it "inapplicable to regulations issued prior to the date of enactment of this amendment." Conference Report No. 770, 82d Cong., 1st Sess. p. 25. See also *Safeway Stores* v. *Freehill,* 202 F. 2d 753 (Em. Ct. App.). The reason for the conference modification, which gave prospective operation to § 402(k), was brought out in the consideration of the 1952 amendments to the Act. The Senate Committee on Banking & Currency, to whom was referred the 1952 bill (S. 2594) to amend the Defense Production Act, stated in its report, with respect to Section 402(k):

> The so-called Herlong amendment, section 402(k) as originally passed, was inapplicable to regulations issued prior to its enactment. This limitation was included because otherwise

> the effect on ceiling price regulations issued prior to its effective date was not clear. * * *
>
> Its purpose [the 1952 Amendment] is to express the congressional intent that as soon as practicable, depending on the circumstances in each case, all distributors be given the markups required by the provisions of section 402(k). * * *. [S. Rep. No. 1599, 82d Cong., 2d Sess., p. 26.[5]]

Assuming the correctness of petitioner's contention (Pet. 12) that § 402(k), as amended in 1952, sets forth a method of ceiling price determination different from that provided by the G. C. P. R., the repugnancy between § 402(k) and the regulation to which he alludes arises only because of the erroneous assumption that 402(k), as amended, operated retroactively so as to nullify all price control proceedings arising under the G. C. P. R. The assumption is contrary to the express language of the amendment, and its legislative history, and, as pointed out above (pp. 2, 7), at the time of the 1952 amendment, petitioner's prices were controlled, not by the G. C. P. R., but by C. P. R. 74 which gave him the percentage markups afforded by § 402(k).

2. Equally unmeritorious is petitioner's contention that the filing of the enforcement proceedings

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[5] See also Conference Rep. No. 2352, 82d Cong., 2d Sess., p. 19. As considered by the Conference Committee, the House bill (H.R. 8210) allowed 60 days in which to bring existing regulations into conformity with the percentage margin requirement of 402(k); the conference substitute eliminated this provision and 402(k) became effective from the date of enactment, June 30, 1952. *Ibid.* p. 19.

in the district court constituted a "new ground" upon which to found a protest. An enforcement proceeding by its very nature neither adds to nor detracts from the provisions of a rule, regulation or order, and hence has no bearing upon its validity or invalidity. New grounds for protest under § 407(a) of the Act must themselves be grounds of objection sufficient to support the otherwise untimely protest, and clearly must be grounds which exist independently of any enforcement proceeding. *Safeway Stores* v. *Arnall,* 195 F. 2d 319 (Em. Ct. App.), certiorari denied, 343 U. S. 965; *Safeway Stores* v. *Freehill, supra.*

Here, again, even if one assumes the correctness of the suggestion, it is of no avail to petitioner for the enforcement suit was commenced June 10, 1952, and the protest was not filed until December 29, 1952, more than the six months thereafter.[6]

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[6] The petition seeks to raise anew questions which relate to the constitutionality of the protest procedure and the adequacy of the review in the Emergency Court of Appeals, as well as the constitutionality of the enforcement proceeding still pending in the district court. These questions were fully disposed of in *Yakus* v. *United States,* 321 U.S. 414, and *Lockerty* v. *Phillips,* 319 U.S. 182.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

OSCAR H. DAVIS,
Acting Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
SAMUEL D. SLADE,
JOHN G. LAUGHLIN,
Attorneys.

JULY 1953.

APPENDIX

Section 407(a) of the Defense Production Act of 1950 c. 932, Title IV, 64 Stat. 807, 50 U. S. C. App. 2107(a), insofar as pertinent, provides:

> At any time within six months after the effective date of any regulation or order relating to price controls under this title, or, in the case of new grounds arising after the effective date of any such regulation or order relating to price controls, within six months after such new grounds arise, any person subject to any provision of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * *

Section 402(k) of the Defense Production Act of 1950, § 104(h) of the Act of July 31, 1951, c. 275, Title I, 65 Stat. 131, 136, as amended by § 110 of the Act of June 30, 1952, c. 530, Title I, 66 Stat. 296, 299-300, (50 U. S. C. A. App. 2102(k)), insofar as pertinent, provides:

> No rule, regulation, order, or amendment thereto shall be issued or remain in effect under this title, which shall deny sellers of materials at retail or wholesale their customary percentage margins over costs of the materials or their customary charges during the period May 24, 1950, to June 24, 1950, or on such other nearest representative date determined under section 402 (c), as shown by their records during such period, except as to any one specific

item of a line of material sold by such sellers which is in short supply as evidenced by specific government action to encourage production of the item in question: * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 98

EDWARD KOHN, DOING BUSINESS AS EDWARD KOHN COMPANY,

Petitioner,

vs.

JOSEPH H. FREEHILL, DIRECTOR OF PRICE STABILIZATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

BRIEF FOR PETITIONER IN REPLY.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

TABLE OF CASES.

	PAGE
Arnall v. Safeway Stores, Inc., 344 U. S. 803, 73 Sup. Ct. 19	5
Nelson v. State, 46 N. E. 943, 17 Indiana App. 403	2
Purified Down Products Corporation v. Freehill, 202 Fed. 2d 166	5
Safeway Stotes v. Arnall, 195 Fed. 2d 319	3
Safeway Stores v. Arnall, 196 Fed. 2d 510	5
Safeway Stores v. Freehill, 202 Fed. 2d 753	5
U. S. v. Corbett, 215 U. S. 233, 242	6
Vermilya-Brown Co. v. Connell, 335 U. S. 337, 386, 69 Sup. Ct. 140, 145	3
Wendell v. Lavin, 158 N. E. 42, 246 N. Y. 115	2
Westwego Canal & Terminal Co. v. Louisiana Highway Commission, 9 So. 2d 389, 200 La. 990	2

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BRIEF FOR PETITIONER IN REPLY.

The respondent makes no answer to petitioner's contentions (1) that petitioner was denied the legal right to present his case to a board of review in accordance with § 497 (c) of the Defense Production Act of 1950, as amended, 50 App. U. S. C., § 2107 (c); (2) that he was denied the right to defend himself in a plenary civil action by the ruling of the Emergency Court of Appeals that he could present a defense to such action only after a judgment was entered against him and leave was granted to him to present his case on appeal to the Emergency Court of Appeals; and (3) that the Fifth Amendment to the Con-

stitution of the United States was violated in not permitting petitioner to present a brief or an oral argument to the Emergency Court of Appeals before said court dismissed the petitioner's appeal.

The respondent bases his answer upon the premise that the petitioner forfeited all of his rights by not having filed a protest with the respondent within the time limitation for filing such protest as prescribed in § 407 (a) of the Defense Production Act of 1950. This contention is based on two erroneous grounds, namely, that the Herlong Amendment to the Defense Production Act, enacted by The Congress on July 31, 1951, is not a law but merely a prescription which was not of any force and effect until the respondent deemed it advisable to put into effect a regulation in accordance with said prescription. In other words, it is respondent's contention that the petitioner was liable for plenary damages for the months of August and September, 1951, although the charges which he made for his products were in accordance with the law passed by The Congress on July 31, 1951, because the respondent did not for some unknown reason issue a regulation which was in accordance with the law passed by The Congress. This contention entirely disregards the legal meaning of the word, "hereafter," as construed by various courts of this land. Moreover, the respondent in his construction of the Herlong Amendment disregards the entire purpose and intent of The Congress in passing said amendment which was to do away with arbitrary prices set by the respondent without any regard for margins of profits over costs which The Congress after many hearings determined should, in all fairness and equity, be allowed to sellers of materials at retail or wholesale.

See *Wendell* v. *Lavin*, 158 N. E. 42, 246 N. Y. 115; *Nelson* v. *State*, 46 N. E. 943, 17 Indiana App. 403; *Westwego Canal & Terminal Company* v. *Louisiana Highway Commission*, 9 So. 2d, 389, 200 La. 990.

This court in the case of *Vermilya-Brown Company, Inc., et al.* v. *Connell,* 335 U. S. 377, page 386, 69 Supreme Court Report 140, page 145, says: " 'Words generally have different shades of meaning and are to be construed if reasonably possible to effectuate the intent of the law makers; and this meaning in the particular instance is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purpose of the law, and the circumstances under which the words were employed.' " The construction of the Herlong Amendment made by the respondent entirely disregards the context and the purpose of the law. This construction makes the respondent the law maker, and under this construction the respondent might never have taken into consideration the laws passed by The Congress and might never have put into effect any regulation which expressed the intent of The Congress. In other words, if respondent's construction of the law is followed then sellers of materials at retail or wholesale can be held liable for plenary damages for months or years after a law of The Congress became effective if the respondent did not deem it to his pleasure to issue regulations in accordance with the purpose of that law.

The case of *Safeway Stores* v. *Arnall,* 195 Fed. 2d 319, cited by the respondent does not in any manner support his contention. The court in that case merely rules that since the grounds for the objections were not included in the protest or complaint they could not be considered for the first time by the Emergency Court of Appeals. All other statements made by the court in said case are merely *obiter dicta* and do not support the attempted construction of the Herlong Amendment made by the respondent.

The second erroneous contention of the respondent in support of his premise is that § 402 (k) as amended by The Congress on June 30, 1952, does not apply to the regu-

lation issued by respondent on January 26, 1951, which is the basis for the plenary action pending in the United States District Court for the Northern District of Illinois, Eastern Division, because on the date that said amendment to the Herlong Amendment was enacted there was a regulation in effect which gave to the petitioner his right to the customary percentage margin over costs during the period from May 24, 1950 to June 24, 1950, by reason of a new regulation promulgated by the respondent on October 1, 1951, Ceiling Price Regulation 74, issued on September 15, 1951, effective October 1, 1951 (16 F. R. 9759).

The respondent in support of this contention quotes a report of the Senate Committee on Banking and Currency (pages 8 and 9 of Brief for Respondent). The language of this report shows that it was the intention of The Congress to pass the amendment to the Herlong Amendment for the purpose of giving all distributors the mark-ups required by the provisions of § 402 (k) of the Defense Production Act, and to rectify the failure of the respondent to carry out the purpose of The Congress in passing the Herlong Amendment on July 31, 1951. The respondent claims that if no rule or regulation was in effect on June 30, 1952 which gave to the seller of materials at retail or wholesale a right to their customary percentage margin over costs then the amendment to the Herlong Amendment applied to said seller, but that if the respondent at any time prior to June 30, 1952, issued a regulation which was in accord with the law of The Congress enacted on July 31, 1951, then the amendment to the Herlong Amendment no longer applied to said seller. This erroneous contention would mean that a seller could be held liable for plenary damages although his prices were in accordance with the law passed by The Congress, and that he could not avail himself of the amendment to the Defense Production Act enacted by The Congress on June 30, 1952, although the regulation which gave

him the right to the customary margin of profit over costs did not take effect until a short period prior to the passage by The Congress of the amendment to § 402 (k) enacted on June 30, 1952. This contention resolves itself to the unfair and inequitable proposition that a seller might be liable for plenary damages for a period of almost one year and could not make use of the amendment to the Herlong Amendment if the respondent at any time prior to June 30, 1952, had issued a regulation in accordance with the law passed by The Congress.

The case of *Safeway Stores* v. *Freehill,* 202 Fed. 2d 753, cited by the respondent does not support such an argument for the purpose of circumventing the law passed by The Congress. This case supports the contention made by the petitioner. In the case of *Safeway Stores* v. *Freehill,* the Emergency Court of Appeals was required to reverse the decision which it made in the case of *Safeway Stores, Inc.* v. *Arnall,* 196 Fed. 2d 510, decided on May 5, 1952, because The Congress thereafter on June 30, 1952, modified the Capehart Amendment to the Defense Production Act § 402 (d), and this court by issuing its writ of certiorari in the case of *Arnall* v. *Safeway Stores, Inc.,* 344 U. S. 803, 73 Supreme Court 19, required the Emergency Court of Appeals to take notice of the Defense Production Act amendment of 1952.

A new law passed by The Congress which by its terms is for the benefit of the petitioner cannot be denied him through a strained and incongruous construction of the law. See *Purified Down Products Corporation* v. *Freehill,* 202 Fed. 2d, page 166. Moreover, to say that a regulation is not in effect although court actions to enforce the regulation are pending in our courts is to disregard the meaning of the words "remain in effect." If the regulation was not in effect it could not be the basis for a court proceeding commenced in June of 1952. The Congress in enacting the

amendment of June 30, 1952, could have excluded violations of regulations theretofore promulgated. The law contains no exceptions to the applicability of the law, and the respondent, in attempting to construe the law as meaning other than what it says, must support its contention with established law.

Plenary actions are not favored by this Court, and the benefit of any doubt will be given to the defendant in such an action. Penal statutes must be strictly construed. See *U. S.* v. *Corbett,* 215 U. S. 233, 242.

The petitioner respectfully submits that his protest to the respondent was not for the purpose of questioning the equity or inequity of a regulation, but was for the purpose of having determined whether or not an action for plenary damages could be brought against him by the respondent although the prices charged by him were in accordance with the law passed by The Congress.

The petitioner again respectfully requests that a writ of certiorari be issued by this court because otherwise a regulation issued by an administrator will have greater value than a law passed by The Congress and for the other reasons set forth in petitioner's petition for writ of certiorari filed herein.

Respectfully submitted,

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